No. 87-633

Supreme Court, U.S.
FILED
DEC 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

APEX OIL COMPANY,

Petitioner,

– against –

JOSEPH DiMAURO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. The Conflict Among The Federal Courts On The First Question Presented Is Apparent, Direct, And Ripe For Adjudication By This Court

The brief filed on behalf of Respondent New York Mercantile Exchange demonstrates the existence of conflicting standards of bad faith among the federal courts. The exchange notes, quite correctly, that the definition of bad faith is now settled in the Second Circuit. It points to *Sam Wong & Son, Inc. v. New York Mercantile Exchange*, 735 F.2d 653, 677 (2d Cir. 1984), which first established the definition, and *Rider Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774 (2d Cir. 1984), which merely reiterated it.[1] There is no dispute that these

[1] The Exchange oddly faults Apex's Petition for not citing *Rider Energy*.

cases require that a party seeking to establish a claim of bad faith demonstrate that " 'self-interest or other ulterior motive unrelated to proper regulatory concerns' is the 'sole or the dominant reason' for the action or inaction in question." Brief in Opposition of Respondent New York Mercantile Exchange at 5 (*quoting Sam Wong*). However, neither of these decisions was reviewed by this Court, and the first question presented in Apex's Petition challenges the standard of bad faith they articulate, which admittedly was applied in this case.

In support of its Petition, Apex cited conflicting articulations of the bad faith standard in the Seventh Circuit. The Exchange tries to avoid this direct conflict by pointing to the recent Second Circuit decision in *Brawer v. Options Clearing Corp.*, 807 F.2d 297 (2d Cir. 1986), *cert. denied*, 56 U.S.L.W. 3243 (U.S. Oct. 5, 1987) (No. 86-1825) (declining to follow *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944)), also not reviewed by this Court, which established that the *Sam Wong* definition of bad faith governs *all* claims addressed to regulatory conduct of contract markets, including the failure to prevent or to remedy broker misconduct.

It is no small observation to note that the United States Court of Appeals for the Second Circuit lacks jurisdiction to overrule cases in sister circuits. That is a jurisdiction that may be exercised only by this Court. As Apex demonstrated in its Petition, the standard of bad faith adopted for all cases in the Second Circuit does not strike the proper balance between exchange autonomy and investor protection and is in conflict with decisions of other Federal Courts. For these reasons, Apex's Petition should be granted and the first question presented resolved in its favor.

II. The Issues Presented By Apex Alone Warrant Consideration By This Court

The brief filed on behalf of the Belcher Respondents in support of Apex's Petition for Certiorari attempts to bolster Belcher's own Petition by maintaining that *both* petitions seek review of the same issues – whether the Court of Appeals properly applied the "slight evidence" standard. Even a cursory review of the opinion below, coupled with the undisputed procedural posture of the case at hand, demonstrates the utter lack of merit to Belcher's position.

Because the court below considered Belcher an integral and decisive factor in the conspiracy at issue, it did not analyze its liability by using the "slight evidence" standard. Rather, the reversal as to Belcher was based on the application of the standards set forth by this Court in *Matsushita* and *Monsanto*. In direct contrast to the case against the other defendants presented in Apex's petition, it is completely irrelevant whether the "slight evidence" test should have been applied to Belcher because the Court of Appeals held that the evidence that Belcher participated in the conspiracy met the more rigorous tests of *Matsushita* and *Monsanto*.

Respectfully submitted,

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